UNITED STATES
v.
KNOX-ARIZONA CORP.

IBLA 79-581 Decided December 31, 1979

Appeal from decision of Administrative Law Judge Michael L. Morehouse, declaring lode mining claims invalid. Arizona 10879.

Affirmed.

1. Administrative Procedure: Burden of Proof -- Mining Claims: Contests -- Mining Claims: Discovery: Generally

When the Government contests a mining claim on a charge of no discovery of a valuable mineral deposit it assumes the burden of going forward with sufficient evidence to establish a prima facie case; when it has done so, the burden shifts to the claimant to show by a preponderance of the evidence that a discovery has been made and still exists within the limits of the claim.

2. Mining Claims: Discovery: Generally

Mineralization that only warrants further prospecting or exploration in an effort to ascertain whether sufficient mineralization might be found to justify mining or development does not constitute a valuable mineral deposit, i.e., a valuable mineral deposit has not been found simply because the facts might warrant a search for such a deposit.

3. Mining Claims: Discovery: Generally

It is incumbent upon the mining claimant, not the Government's mineral examiner, to do that amount of work which is necessary to discover a valuable mineral deposit.

4. Evidence: Generally -- Mining Claims: Contests

The decision of an Administrative Law Judge will not be disturbed on appeal where the preponderance of the evidence supports the result he reached.

APPEARANCES: John C. Lacy, Esq., DeConcini, McDonald, Brammer, Yetwin & Lacey, P. C., Tucson, Arizona, for appellant; John McMunn, Esq., for appellee, Office of the Solicitor, Department of the Interior, San Francisco, California.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

This appeal is from a decision by Administrative Law Judge Michael L. Morehouse declaring 79 lode mining claims invalid. The claims are situated within the Organ Pipe Cactus National Monument.

On May 19, 1978, the Bureau of Land Management, on behalf of the National Park Service, issued a complaint charging that there was no discovery of valuable minerals on the claims.

A hearing on the contest was held on February 28, 1979, in Tucson, Arizona. The Judge's decision finding the claims invalid was issued on August 10, 1979. The decision sets out the pertinent evidence, the applicable law, and the Judge's analysis and conclusions. We agree with the decision and adopt it as the decision of this Board. A copy of it is attached hereto.

Appellant's first assignment of error is that the Judge improperly evaluated the evidence concerning "the grade of the deposit." Appellant asserts that a continuity of mineralization exists on the subject claims and quotes from the testimony of Mr. Anthony Lane, a mining engineer and geologist, who estimated that with heap leaching methods copper could be extracted from the ore and a .2 percent cutoff grade could be established for commercial operations (Tr. 133). Appellant says that the contestant failed to effectively dispute the .2 percent figure. Appellant further suggests that fluctuations in the price of copper since 1970 are a matter for judicial notice which the Judge improperly failed to take into account. Appellant contends that he is in the position of a prudent man justified in the belief that a sustained upward trend in the price of copper would continue and result in a profitable remuneration.

Mr. Lane's testimony is discussed on pp. 4-5 of the decision. Mr. Lane's contention that a profitable operation could be maintained

at a .2 percent cutoff grade was based on 1970 copper prices but he conceded that in 1976 1/ the cutoff grade would have to have been higher. Mr. Lane also testified that no active mining operations had been undertaken because Knox-Arizona did not have the necessary funds and did not "want to deface the area" (Tr. 146-147). The decision also quotes testimony by Mr. William Knox, one of appellant's principals, who conceded that the claims were in the exploratory stage (Dec. p. 4, Tr. 125). Further evidence leading to the Judge's negative conclusion concerning mineralization was provided by contestant's mining engineer who found insufficient values on some of the claims and nothing to sample on others. The engineer gave his opinion that a prudent person would not expend his means in the hope of developing a profitable mine.

The decision (p. 7) reveals that the price of copper on all relevant dates was duly considered by the Judge. The record unmistakably indicates that even in light of the highest values, the extraction of copper from appellant's claims would not have been profitable (Tr. 47-52, 77-78).

[1, 2] The Judge's concise evaluation of the evidence on the issue of mineralization (Dec. pp. 5-8) correctly reflects that contestant established a prima facie case of no discovery and that the evidence of contestee was insufficient to show more than that further exploration might be warranted. Such a showing does not constitute a discovery. United States v. Tempest Mining Co., 40 IBLA 297 (1979).

Appellant further argues that contestant's mining engineer failed to properly carry out his duties in that he neglected to sample an underground shaft area which was shutdown after one shipment of high grade ore had been extracted.

[3] The contestant's engineer testified that he felt the area in question was unsafe to enter. That judgment was not rebutted by appellant. Upon cross-examination, appellant's counsel could only surmise as to the extent, if any, of any mineralization in the shaft. (Tr. 57). It is not the task of the Government's mineral examiner to do the requisite work leading to the discovery of a valuable mineral deposit, United States v. Porter, 37 IBLA 313 (1978), nor is evidence of past profitable mining proof that the claim is presently profitable, United States v. Bechtold, 25 IBLA 77 (1976). It is the responsibility of a mining claimant to make his asserted discovery points available for examination by the Government's mining engineer. United States v. Timm, 36 IBLA 316 (1978); United States v. Mattox, 36 IBLA 171 (1978).

1/ The lands were closed to mineral entry in 1976, by the Act of September 28, 1976, 16 U.S.C. §§ 1901-12 (1976).

The appellant's remaining arguments are that the Judge used an improper rule of discovery, that he erroneously considered evidence relating to another copper mining operation, that he placed undue emphasis on appellant's testimony respecting the exploratory stage of the claims, and that the National Park Service prevented complete exploration of the claims thereby precluding "the potential discovery of a large disseminated copper ore body."

[4] We have studied these contentions in light of the record herein, and find that they are either unsupported by factual basis or have no material bearing on the issues involved, or both. Since the preponderance of the evidence supports the result reached by the Judge his decision will not be disturbed on appeal.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Frederick Fishman
Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

James L. Burski
Administrative Judge

August 10, 1979

UNITED STATES OF AMERICA,	:	ARIZONA 10879
	:	
Contestant	:	Involving the Virginia
	:	Nos. 1-8, incl.; Virginia
v.	:	Extension Nos. 1-10, incl.;
	:	VA Nos. 1-7, incl.; April
ANTHONY LANE, Statutory	:	Fool Nos. 3-32, incl.;
Agent, KNOX-ARIZONA	:	April Fool Nos. 38-55,
CORPORATION,	:	incl.; Alice Nos. 1 and 2,
	:	CMS 6 and CMS 31, Ajo Butte
Contestee	:	Nos. 1 and 2 lode mining
:		claims located in protracted
	:	Sections 22, 23, 24, 25, 26,
	:	27 and 35, T. 15 S., R. 5
	:	W., GSR Mer., Pima County,
	:	Arizona

DECISION

Appearances: John McMunn, Esq., Office of the Solicitor,
Department of the Interior, San Francisco,
California, for Contestant;

John C. Richardson, Esq., Tucson, Arizona,
for Contestee.

Before: Administrative Law Judge Morehouse

This is a proceeding involving the validity of the above 79 lode mining claims located under the General Mining Laws of 1872, as amended, 30 U.S.C. § 22, et seq. The proceeding was initiated by the Arizona State Office, Bureau of Land Management, at the request of the National Park Service.

Pursuant to 43 CFR 4.451, the Bureau of Land Management issued a complaint on May 19, 1978, charging that the subject mining claims are invalid because (a) "there are not presently disclosed within the boundaries of the mining claims minerals of a variety subject to the mining laws, sufficient in quantity, quality and value to constitute a discovery". A timely answer was filed denying the allegations and a hearing was held at Tucson, Arizona, on February 28, 1979.

The subject claims were located between July 1, 1925 and March 27, 1975 as set out in the complaint. All the claims are within the boundaries of the Organ Pipe Cactus National Monument which was closed to mining entry on September 28, 1976 (16 U.S.C. § 1901). Thus, to establish the validity of the claims contestee must show a valid discovery by a preponderance of the evidence as of the time of withdrawal or at some other time in the past and maintained to the time of the present challenge. See Cameron v. United States, 252 U.S. 450 (1919); Udall v. Snyder, 405 F.2d 1179 (10th Cir. 1968); United States v. Gunsight Mining Company, 5 IBLA 62 (1972).

The claims are located in a grid pattern (see Ex. G-2) on an alluvial plain in the middle of which is a hill called "Copper Mountain". "Copper Mountain" is a mineralized intrusion of granitic rock and is encompassed by claims Ajo Butte Nos. 1 and 2. A tunnel has been cut through Copper Mountain in a generally north-south direction (see Exs. G-7, R-13) and in the early 1950s approximately 70 tons of ore was mined from a winze within the tunnel and shipped to the Phelps Dodge smelter at Ajo, Arizona. Over the years, contestee has entered into a series of lease option agreements with various mining companies (Phelps Dodge, American Smelting & Refining Co., New Jersey Lead & Zinc, Co., Hidden Splendor Mining Company, Pangea) and a number of holes have been drilled on the claims as indicated on Exhibits G-2 and R-8. None of these lease option agreements have been exercised.

Mr. Robert O'Brien, a mining engineer and mineral appraiser employed by the National Park Service, examined the claims each year from 1973 to 1978 and in 1978 took 16 samples from the surface of Copper Mountain and the tunnel (for location and assay values see Exs. G-3, G-5 and G-6). He had previously discussed discovery points with contestee. In addition, he considered the drilling information that

was available to him as indicated on Exhibit G-2. He also examined in 1975 splits of cores from holes being drilled by contestee and in 1977 examined the core of a hole being drilled by Pangea. All of the government samples were taken from Ajo Butte Nos. 1 and 2. Mr. O'Brien testified that he went over the other claims and found nothing to sample. He took into consideration the various possible types of mining operations (underground, open pit, leeching) and reached the conclusion that there was neither the quantity nor quality of ore available in the Copper Mountain deposit or on any of the other claims to justify a prudent person in expending his time and effort with the hope of developing a profitable mine.

Mr. William Knox, one of the principals of the Knox-Arizona Corporation, testified regarding the history of the subject claims. His father was a pioneer in the area and located numerous claims including some of the subject claims in the early 1900s. The contestee corporation was formed in 1952 and has been kept alive over the years because some other individuals have invested funds in the company and because of the potential that the claims might develop into something worthwhile. In 1916, American Smelting & Refining Company entered into a lease option agreement with his father (Ex. R-1) and drilled a hole on Copper Mountain to the approximate depth of 380 feet. Following formation of the corporation, the tunnel was drifted through Copper Mountain in 1953, and in 1954 two miners were employed for approximately three months and approximately 68 tons of selected ore was mined from the winze area in the tunnel and shipped to the Phelps Dodge smelter. Only one shipment was made and the operation was then closed down, evidently because his father felt that the miners were inexperienced and might hurt themselves. Subsequent to this, some geophysical work was done and a geophysical map prepared (Ex. R-6). In 1962, Hidden Splendor Mining Company drilled a hole to 1,500 feet on April Fool No. 16 directly to the northwest of Copper Mountain (Ex. R-10) and in 1973, Knox-Arizona Corporation drilled a hole on Copper Mountain to 1,659 feet parallel to the hole drilled by Asarco in 1916 (Ex. R-7). There was further geophysical work performed by Amax Exploration, Inc., which showed mineralized granitic intrusives to the east of Copper Mountain on April Fool Nos. 27 and 28 (Ex. R-8). At about this time, Phelps Dodge became interested in the area and drilled a hole on April Fool No. 47 (Hole K-2 on Ex. G-2), however, the drill logs (Ex. R-9) did not show commercial quality. At the end of his testimony on direct examination, Mr. Knox made the following statement:

> A. Well, the only other statement that I have to say to you gentlemen and that is that I wish we could work out something whereby this area could just be proven or disproven, if there is a mine there, I think it will be to all -- it will not destroy the wilderness because you have the other area. This trends [sic] to be up to the northeast -- it's not too far. It's only about, I think eleven (11) miles from your north border and I just -- I think it would be a shame not to have it -- this explored. That's all. (Tr. 125)

Mr. Anthony Lane, a mining engineer and geologist who operates a consulting firm in Tucson, Arizona, testified that he made an ore reserve calculation on Ajo Butte No. 1 and Ajo Butte No. 2 in 1970. These calculations (Ex. R-11) are based on samples taken from bulldozed cuts on the east side of Copper Mountain lying on the two claims just mentioned (for assay results see Ex. R-12). He identified four vein systems and estimated a total tonnage of 3,575,383 tons with an average copper content of .13 percent copper. The total value was estimated at $5,577,597.48. This tonnage estimate related only to the vein systems samples and not to all the material in Copper Mountain. He envisioned a leeching operation where minable widths that would fit a medium-sized bulldozer would be pushed off the mountain onto a plastic-lined leech pad at the base of the mountain where the material could then be treated with acid and water. He felt that the material on Ajo Butte Nos. 1 and 2 would extend into April Fool No. 4 and would probably extend into April Fool Nos. 18 and 19. In addition, a sample taken from the intruded granitic area on April Fool Nos. 27 and 28 (see sample No. 40 on Ex. R-12) assayed at .34 percent copper which would indicate that material from these claims could be processed in the same operation. In his opinion, .20 copper was the cutoff at which a profitable operation could be maintained and this was based on 1970 copper prices. He conceded that in 1976 the cutoff grade would have to have been higher than .2 due to the 1976 copper prices. He calculated the value of the Copper Mountain property at $1,300,000.00 by analyzing the average option exercise price in the various lease option agreements averaging that figure with 25 percent of his gross value calculation, i.e., $5,577,597.48 on Exhibit R-11. The reason why no mining operation was commenced is explained in the following colloquy:

BY MR. MC MUNN:

Q. Mr. Lane, on your computations and figures in 1970, that I believe you stated in direct testimony were prepared certainly not for the purposes of the hearing today, almost a decade later, but if I could use your words, for active operations, --

A. Yes, sir.

Q. The question arises in my mind why were active operations not entered into? At that time?

A. One basic reason, Knox Arizona did not have the funds, for the initial operation. Number two, certain members of Knox Arizona didn't particularly want to deface that area.

Q. Was an attempt made to secure funds by taking data that you have available on these claims around to mining companies and perhaps banks or other financial institutions?

A. No, sir, in neither instance would this be of sufficient consequence to interest a major company. The number of smaller mining companies that existed in 1970 that were progressive enough to even conceive such a concept as this, and particularly within the national park, were quite few and far between. Secondly, Knox Arizona as a production company did not have any particular credibility with the local banks and the local banks are notorious for not funding mining operations. (Tr. 146-147)

The Department of the Interior and the courts have consistently held that (1) a mining claim cannot be recognized as valid unless a valuable mineral deposit has been found within the limits of the claims, (2) a valuable mineral deposit is an occurrence of mineralization of such quality and quantity as too warrant a person of ordinary prudence in the expenditure of time and money in the development of

a mine and the extraction of the mineral; and (3) the test of whether a valuable mineral deposit has been found is whether the facts warrant the development or mining of the property and not whether the facts warrant prospecting or exploration in an attempt to ascertain whether the property should be developed. Chrisman v. Miller, 197 U.S. 313 (1905); United States v. Coleman, 390 U.S. 599 (1968); Henault Mining Company v. Tysk, 419 F.2d 766 (9th Cir. 1969); Barton v. Morton, 498 F.2d 288 (9th Cir. 1974); United States v. Winegar, 16 IBLA 112, 81 I.D. 370 (1974).

When the government contests the validity of a mining claim, it bears only the burden of proof of going forward with sufficient evidence to establish a prima facie case. The ultimate burden is on the mining claimant to show by a preponderance of the evidence that the claims are valid. A prima facie case is made where a government mineral examiner testifies that he has examined the exposed workings on a claim and has found no mineralization sufficient to support the finding of a discovery of a valuable mineral deposit. The government's mineral examiner is not required to perform discovery work for the claimant, to explore beyond the claimant's exposed workings, or to rehabilitate discovery points for the claimant. Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959); United States v. Woolsey, 13 IBLA 120 (1973); United States v. Taylor, 19 IBLA 9, 82 I.D. 68 (1975).

Contestee contends in its brief that the evidence establishes the validity of Ajo Butte Nos. 1 and 2 and April Fool Nos. 4, 18, 19, 27 and 28. With respect to the other claims, it is contended the government has failed to meet its burden in establishing a prima facie case of invalidity and the complaint should be dismissed without prejudice as to them, citing United States v. Hess. Contest No. A-10838, decided March 27, 1979.

With respect to Ajo Butte Nos. 1 and 2 and April Fool Nos. 4, 18, 19, 27 and 28, I find that the government has established a prima facie case of invalidity. As noted above, the ultimate burden is on the mining claimant to show by a preponderance of the evidence that the claims are valid. I must conclude they have failed in this regard. The government's expert was unable to compute the amount of ore reserves on Ajo Butte Nos. 1 and 2 and even taking the estimate of contestee's expert, 3,575,383 tons averaging .13 percent copper, by his own admission this would be insufficient to sustain a leeching operation. It may well be that some of the material could be scraped from the

mountain onto the leeching pad at a higher percentage grade, but on the basis of this record it is just as probable that lower grade material would be encountered. There is testimony to the effect that in another leeching operation in Arizona, The Old Reliable Mining Company had substantial tonnage reserves of .8 ore and was forced to shut down a leeching operation when the price of copper reached 74 cents a pound. The price of copper in September 1976, prior to withdrawal, was approximately 74 cents a pound and even considering the fact that the price may have been as high as 80 cents a pound in 1970, the ore grade would still have to be higher than .13 to sustain a leeching operation. With respect to the prospect of an underground operation, the only evidence is that approximately 68 tons of ore was mined from the winze area in the tunnel, high graded, and shipped to the Phelps Dodge smelter in 1954. The operation was closed down following that shipment. With respect to April Fool Nos. 27 and 28, the only evidence in the record is that there is a mineralized granite intrusive on the claims from which a single sample was taken showing .34 percent copper. There is no other evidence as to the quality of this deposit and no evidence whatsoever as to the quantity. As to April Fool Nos. 4, 18, and 19, contestee is merely asserting that because these claims adjoin Copper Mountain on the east and northeast, it must be assumed that the same mineralization exists on these claims. It is recognized that several holes have been drilled on Copper Mountain and that some of the cores have shown copper mineralization at various depths, however, there is absolutely no evidence showing a commercial ore deposit and for that matter there is no evidence of such deposit from the holes drilled on any of the other claims. At best, the area encompassed by the claims is still in an exploratory phase as indicated by Mr. Knox's statement set out above.

With respect to the other claims, I also conclude that the government has established a prima facie case. In Hess, the Chief Administrative Law Judge recognized the general rule that the function of the government's mineral examiner is to investigate the workings on a claim and to make an evaluation as to whether a mineral deposit has been found which would meet the test of discovery. He has no duty to excavate for minerals or to rehabilitate the claimant's discovery points or to explore or sample beyond the claimant's workings or to drill or excavate any purportedly mineralized area which is concealed by overburden or is otherwise difficult of access. United States v. Calla

Mortenson, et al., 7 IBLA 123 (1972); Humboldt Placer Mining Company v. Secretary of the Department of the Interior, 549 F.2d 622 (9th Cir. 1977); United States v. Ramsey, 14 IBLA 152 (1974); United States v. Woolsey, 13 IBLA 120 (1973); United States v. Taylor, 82 I.D. 68 (1975); United States v. Rukke, 32 IBLA 155 (1977); United States v. Miles, 36 IBLA 213 (1978).

He also recognized that in certain circumstances, the government may establish a prima facie case even though its experts were not physically present on the mining claims. See United States v. Fisher Contracting Company, A-28779 (August 21, 1962); United States v. Zweifel, 80 I.D. 323, 339-340 (1973), aff'd sub nom.; United States v. Long Beach Salt Company, 23 IBLA 41 (1974); United States v. Rukke, supra. However, under the particular circumstances present in Hess, he decided that where the government's mineral examiner did not physically go onto some of the claims, and an unrepresented contestee offered no evidence concerning validity, the government had failed to make a prima facie case.

The evidence in this case is that the government's expert, Mr. O'Brien, did go on all of the claims at issue but found nothing to sample except on Ajo Butte Nos. 1 and 2. He requested that he be shown all the discovery points on the claims and was directed to the Copper Mountain area where he took 13 samples. In addition, he considered all the samples taken by contestee and such information as was available from the drill holes on the other claims. Under these circumstances, I find the evidence sufficient to establish a prima facie case with respect to all of the claims. Contestee offered no evidence regarding validity with respect to these other claims other than the fact that exploratory holes had been drilled under lease option agreements that had never been exercised. The only reasonable conclusion that can be drawn from this is that the area encompassed by the claims looked promising to a number of mining companies but that exploratory drilling failed to fulfill that promise.

Accordingly, the 79 subject lode mining claims are declared invalid.

Michael L. Morehouse
Administrative Law Judge

Appeal Information

The contestee, as the party adversely affected by this decision, has the right of appeal to the Interior Board of Land Appeals. The appeal must be in strict compliance with the regulations in 43 CFR Part 4. (See enclosed information pertaining to appeals procedures.)

If an appeal is taken the adverse party, the Bureau of Land Management, can be served by service upon the Office of the Field Solicitor at the address listed below.

Enclosure: Information Pertaining to Appeals Procedures

Distribution:
By Certified Mail

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